Supreme Court, U.S.
FILED

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No. 01-

IN THE

Supreme Court of the United States

JAMES E. THOMPSON,

Petitioner,

v.

ALUMINUM COMPANY OF AMERICA,
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
and UNITED STEELWORKERS LOCAL 303,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether or not the decision of the United States Court of Appeals for the Fourth Circuit conflicts with prior decisions of the Fourth Circuit?

Whether or not the decision of the United States Court of Appeals for the Fourth Circuit conflicts with a decision of another United States Court of Appeals and sanctions a departure from the accepted and usual course of judicial proceedings by the lower court so as to call for an exercise of the supervisory power of the United States Supreme Court?

PARTIES TO THE PROCEEDING

The Petitioner is an employee at the Badin, North Carolina, facility of Aluminum Company of America, Inc. (Alcoa), and is a member of United Steelworkers Local 303.

The Respondents are Petitioner's employer, Alcoa, and his union, United Steelworkers Local 303 and the United Steelworkers of America, AFL-CIO-CLC.

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The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. A) is a published opinion. The opinion of the United States District Court for the Middle District of North Carolina (App. B) is published.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 22, 2002 (App. A). The United States Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on February 20, 2002 (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

§ 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

STATEMENT OF THE CASE

Petitioner James E. Thompson (Thompson) filed an action in the Superior Court of Stanley County, North Carolina, pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging that his employer, Alcoa, breached the Union Agreement at his workplace and

that his Union breached its duty of fair representation to him. The Respondents removed this action to the United States District Court for the Middle District of North Carolina. The Respondents answered the Complaint, and following discovery, moved for an order granting summary judgment. On March 30, 2001, the United States District Court for the Middle District of North Carolina granted Respondents' Motions for Summary Judgment pursuant to Fed. R. Civ. P. 56(c). Petitioner appealed the United States District Court's order granting summary judgment in favor of the Respondents to the United States Court of Appeals for the Fourth Circuit.

The United States Court of Appeals for the Fourth Circuit affirmed the judgment of the United States District Court on January 22, 2002. Thereafter, the Court of Appeals entered an Order denying Petitioner's timely petition for rehearing and petition for rehearing en banc on February 20, 2002.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THE FOURTH CIRCUIT.

The decision of the United States Court of Appeals for the Fourth Circuit conflicts with prior decisions of the Fourth Circuit. This conflict alone provides a compelling reason to grant this petition.

The United States Court of Appeals for the Fourth Circuit previously has held that a collective bargaining agreement

calls into being the common law of the particular industry *or of the particular plant. Tobacco Workers Int. Union Local 317 v. P. Lorillard Corp.*, 314 F. Supp. 513, 520 (M.D.N.C. 1970), *affirmed in part, reversed in part on other grounds*, 448 F.2d 949 (4th Cir. 1971). The decision of the United States Court of Appeals in the instant case conflicts with its prior decision in *Tobacco Workers Int. Union Local 317 v. P. Lorillard Corp.*, 314 F. Supp. 513, 520 (M.D.N.C. 1970), *affirmed in part, reversed in part on other grounds*, 448 F.2d 949 (4th Cir. 1971).

A. Section 80 - Union Contract

The Master Agreement addressed health matters including work-related medical conditions (Persons Dep., Exhibit 1, Section 80, p. 110.; Jt. App. 402). Section 80 provided, in pertinent part,

> 1. When, because of a disability attributable in whole *or in part* to his employment with the Company, it is medically indicated that an employee be removed from his job, the following shall apply:
>
> > a. The removed employee shall be entitled to exercise all rights under the Agreement as though he had been affected by a reduction in forces. Such rights include, but are not limited to, the right to transfer to an available job in his own plant or to one in another plant if no job is available in his own plant.

> 2. A removed employee demoted or transferred pursuant to paragraph 1. a. to a lower job grade shall nevertheless be paid at the job grade not less than the job from which he was removed. (Persons Dep., p. 70, Exhibit 1; Jt. App. 311, 346) (emphasis added). Section 80 had not presented any problems under the Union Contract prior to 1996 and Eddie Thompson (Frick Dep., p. 33, l.1-25; Jt. App. 1081).

Section 80(1)(a) of the Union Contract applies where an employee is unable to perform his job "because of a disability attributable in whole *or in part to his employment* with the Company" (Jt. App. 165) (Emphasis added). The medical evidence indicated that Eddie Thompson's medical condition was, at the very least, attributable *in part* to his duties in the potroom at Badin Works. Dr. Landis thought that the potroom was aggravating the Petitioner's asthma. *The past practice and custom at Badin Works was to treat such medical conditions as covered under Section 80.* Unfortunately, Eddie Thompson's case was treated differently.

B. Past Practice

Past practice under Section 80 had been to allow Badin employees to bump less senior employees where work was available, transfer to another Alcoa plant if hiring, or to receive supplemental unemployment benefits (Frick Dep., p. 33, l. 1-10; Jt. App. 1081). *Past practice and custom at Badin Works under Section 80(1)(a) of the Agreement demonstrated that there was a genuine issue of material fact as to whether or not the Union breached its duty of fair representation and whether or not Alcoa breached the Agreement.*

In interpreting a collective bargaining agreement, it is often necessary to go outside the four corners of the Agreement itself to determine the rights of the parties. Collective bargaining agreements are not ordinary contracts. A collective bargaining agreement calls into being the common law of the particular industry or of the particular plant. *Tobacco Workers Int. Union Local 317 v. P. Lorillard Corp.*, 314 F. Supp. 513, 520 (M.D.N.C. 1970), *affirmed in part, reversed in part on other grounds*, 448 F.2d 949 (4th Cir. 1971).

C. Dissimilar Treatment

Past practice under Section 80 had been to allow Badin employees to bump less senior employees where work was available, transfer to another Alcoa plant if hiring, or to receive supplemental unemployment benefits (Frick Dep., p. 33, l. 1-10; Jt. App. 1081).

Deposition testimony indicated that several Badin employees, Sam Blalock, Dianne Burris, Houston Pratt, Danny Gallegos, Randy Shell, and Sam Miller were laid off or disqualified under Section 80 and all allowed to bump into other positions at Badin or transfer to another Alcoa plant, or to receive supplemental unemployment benefits while on layoff (Frick Dep., p. 56, l. 5-10; Jt. App. 1104; Thompson Dep., p. 46, l. 9-15; Jt. App. 514; Pratt Dep., p. 84, l. 20-25; Jt. App. 868; Medlin Dep., p. 41, l. 24-25; p. 42, l. 1; p. 67, l. 1-16; Jt App. 735, 736, 761). At that time, Alcoa ordinarily looked for ways to place an employee in another job rather than placing them on sick card (Medlin Dep., p. 39, l. 14-18; Jt. App. 733).

When Houston Pratt, *the Union Steward for the potroom*, had a heart attack, instead of working in the potroom, he was placed on layoff and received supplemental unemployment benefits. When Dianne Burris had a non-work related medical condition, instead of going into the potroom, she was allowed to transfer to Point Comfort, Texas. At the time of his disqualification, Petitioner was unaware of the circumstances surrounding Alcoa's transfer of Dianne Burris to its Point Comfort, Texas facility. Later, at step meetings for Grievance BA-1969, Petitioner inquired about Burris' transfer of Rob Person, Badin Human Resource Manager, who refused to discuss her transfer. The medical cases of Houston Pratt and Dianne Burris under Section 80 had occurred prior to the handling of Eddie Thompson's case.

Despite questioning by Houston Pratt, Lowell Frick, and Helen Deese (Medlin), Dan Rendine insisted that Eddie Thompson was "different" from other prior cases under Section 80. Helen Deese (Medlin) testified that she asked Dan Rendine for clarification of Mr. Thompson's status (Medlin Dep., p. 54, l. 1-3; Jt. App. 748). Helen Deese (Medlin) cited the examples of Dianne Burris, Sam Blalock, and Houston Pratt to Dan Rendine who said those cases "were different" (Medlin Dep., p. 61, l. 7-10; Jt. App. 755). Houston Pratt testified that he disagreed with Alcoa's definitions of "disqualification" under the Master Agreement (Pratt Dep., p. 58, l. 1-3; Jt. App. 842). Helen Deese (Medlin) examined the Union Contract for ten (10) minutes and, other than Section 80, could find no definition of a "medical" disqualification (Medlin Dep., p. 21, l. 5-8; p. 20, l. 24-25; Jt. App. 715, 714).

Eddie Thompson was treated differently than Houston Pratt and Dianne Burris. He was told that his medical

condition was *not* work-related (which he disputed) but then his situation was treated differently than other non-work-related medical situations. *Eddie Thompson was treated differently than his Union Steward and other Union members under similar circumstances.*

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT CONFLICTS WITH A DECISION OF ANOTHER U.S. COURT OF APPEALS AND SANCTIONS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY A LOWER COURT.

The decision of the United States Court of Appeals for the Fourth Circuit conflicts with a decision of another United States Court of Appeals and sanctions a departure from the accepted and usual course of judicial proceedings by a lower court.

A United States District Court may amend the pleadings to conform to the evidence in a § 301 case merely by entering findings on the unpleaded issues. No formal amendment of the pleadings is necessary. *Galindo v. Stoody Co.*, 793 F.2d 1502, 1513 (9th Cir. 1986). The United States District Court erred in failing to do so in this case. Thus, the decision of the United States Court of Appeals in the instant case conflicts with the decision of the United States Court of Appeals for the Ninth Circuit in *Galindo v. Stoody Co.*, 793 F.2d 1502, 1513 (9th Cir. 1986). This conflict alone provides a compelling reason to grant this petition. Further, and for the same reason, the decision of the United States Court of Appeals in this case sanctions a departure by a lower court

from the accepted and usual course of judicial proceedings as decided by *Galindo v. Stoody Co.*, 793 F.2d 1502, 1513 (9th Cir. 1986).

A. Grievance BA-1844

Appellant's disqualification and transfer request in January of 1996 occurred *within the context* of Grievance BA-1844. *Evidence concerning the Unions' handling of this grievance was the subject of, and adduced in, discovery in this case and argued in Plaintiff's Brief in the United States District Court.* A United States District Court may amend the pleadings to conform to the evidence in a § 301 case merely by entering findings on the unpleaded issues. No formal amendment of the pleadings is necessary. *Galindo v. Stoody Co.*, 793 F.2d 1502, 1513 (9th Cir. 1986). The United States District Court overlooked this evidence.

As a result of the Grievance BA-1844 step meetings, Eddie Thompson was sent to see a Company doctor, Dr. Landis in Charlotte (Pratt Dep., p. 75, l. 5-9; Jt. App. 859). Dr. Landis did *not* disqualify Eddie Thompson from his pot servicer position (Thompson Dep., p. 39, l. 2; Jt. App. 507). However, Dan Rendine, seizing the opportunity to put Eddie Thompson out of the plant, disqualified Mr. Thompson from his pot servicer position (Pratt Dep., p. 76, l. 10-15; Jt. App. 860; Thompson Dep., p. 43, l. 8-12; Jt. App. 511). Rendine took the position that Alcoa had no other available positions for Eddie Thompson and Alcoa was going to lay him [Thompson] off on sickness and accident benefits (Pratt Dep., p. 76, l. 10-15; Jt. App. 860). Because the disqualification of Eddie Thompson occurred within Grievance BA-1844, the Unions should have pursued that grievance to arbitration, as recommended by Houston Pratt, the Union Steward.

Houston Pratt believed that Alcoa had breached the Union Contract in disqualifying Eddie Thompson (Pratt Dep., p. 36, l. 24-25; p. 37, l. 1-3; Jt. App. 820, 821) and recommended to Marshall Owens, Local 303 president, to take grievance BA-1844 to arbitration (Pratt Dep., p. 27, l. 9-16; p. 70, l. 11-13; Jt. App. 811, 854). Marshall Owens told Pratt that he "had to look into the grievance" and would get back to him but never did (Pratt Dep., p. 95, l. 14-16; p. 71, l. 9-12; Jt. App. 879, 855).

The deposition testimony indicates that BA-1844 may still be a pending grievance. Certainly, Eddie Thompson testified that he had reviewed his personnel record and the discipline remained "a black mark on his record" (Thompson Dep., p. 87, l. 4; Jt. App. 555). Local 303 should have pressed BA-1844 to arbitration in view of the fact that Eddie Thompson's disqualification occurred as a result of, and in the context of, BA-1844. As Houston Pratt testified, "I talked them into-instead of any further discipline, like they normally do, to send him to a specialist to keep from ---" (Pratt Dep., p. 69, l. 8-11; Jt. App. 853). *The lower courts' review should have included Grievance 1844.*

B. Thompson Misled by Union

The Union Defendants, citing Thompson's "ill-considered" decision to pursue a workers comp claim, attempted on appeal to blame Eddie Thompson for their gross negligence in January of 1996. However, Mr. Thompson had a clear recollection that, immediately after the January 29, 1996, meeting, he asked Houston Pratt, his Union Steward, about the need to file a grievance (Thompson Dep., p. 68, l. 21-25; Jt. App. 536). Pratt responded "No, the workers comp will settle one way or the other" (Thompson Dep.,

p. 179, l. 12-15; Jt. App. 646). It is interesting to note that Houston Pratt took notes of the January 29, 1996 meeting but that Pratt has been "unable to locate" his notes (Pratt Dep., p. 35, l. 3-7; p. 37, l. 12-15; p. 81, l. 2-5; Jt. App. 819, 821, 865). Eddie Thompson was misled by his Union Steward, Houston Pratt, when he asked Pratt about grieving the transfer denial.

C. Grievance BA-1855

Once Alcoa disqualified Eddie Thompson and put him out of the plant on sick card, Mr. Thompson was supposed to receive sickness and accident benefits. However, he did not receive any sickness and accident benefits for over nine (9) months (Thompson Dep., p. 101, l. 5-6; Jt. App. 569). Eddie Thompson was without work, without his regular pay, without his supplemental unemployment (SUB) benefits, and without S&A benefits. He telephoned Houston Pratt, Lowell Frick, Marshall Owens, Joe Weber, and anyone else with the Union that he could contact. He spoke with Helen Deese (Medlin) and Pam Ford, the Alcoa benefits administrator. He telephoned Barbara Richey with Aetna Insurance, the S&A carrier. She told him that Alcoa told her not to pay him. Finally, *as a result of his telephone calls*, Eddie Thompson began receiving S&A benefits in November, 1996. The only explanation that he ever received concerning the hold-up of his S&A benefits was that Dan Rendine had instructed that S&A benefits be withheld from Eddie Thompson.

In his affidavit, Marshall Owens attempts to take credit for "pressuring" Alcoa management into paying these benefits. While it is true that Marshall Owens filed Grievance BA-1885 over the S&A benefits, benefits were not paid to Eddie Thompson until 5 ½ months later. It is instructive to

note that Marshall Owens indicated that the "date of incident" of BA-1855 was the same date, May 16, 1996, as he filed Grievance BA-1885. This practice was common among Local 303 officials as Lowell Frick did the same thing on Grievance BA-1969. This practice reflects the gross deficiencies at Local 303 and indicates that time limitations were *not* adhered to by the parties.

D. ***Grievance 1978 vs. Grievance 1969***

The Union Defendants argued on appeal that the fact that Eddie Thompson received a wage-enhancement under Section 80 supports their reasoning that the transfer grievance under Section 80 should not have been pursued to arbitration. *However, this reasoning is illogical and irrational.*

Badin management conceded that Section 80 applied. As Rob Persons, Human Resource Manager at Alcoa, candidly admitted, "I believe that, as a result of the mediation, we accepted responsibility for Mr. Thompson's condition and, in my mind, that changed the status of whether the rate retention language applied" (Jt. App. 294). Local plant officials paid Eddie Thompson the retention rate under Section 80 *because of* the workers comp settlement. However, corporate officials at Alcoa then refused to pay Mr. Thompson back pay or transfer him under Section 80 *because of* the workers comp settlement. On the one hand, Alcoa, in Grievance BA-1978, conceded that Section 80 did apply and, on the other hand, in Grievance BA-1969, Alcoa argued that Section 80 did not apply.

The ultimate position of the Company with respect to Grievance BA-1969, when juxtaposed with the Company's resolution of Grievance BA-1978, was inconsistent,

unreasonable, and irrational. The acceptance of this inconsistent position by the Union Defendants was unreasonable and irrational.

Lowell Frick testified that he believed that Eddie Thompson was "done wrong" (Frick Dep., p. 110, l. 7-11; Jt. App. 1158) and that, given Alcoa's position on Section 80, Eddie Thompson was "doomed if he does; he's doomed if he don't." (Frick Dep., p. 105, l. 2-7; Jt. App. 1153). *Eddie Thompson was put in a "Catch-22" situation.*

Petitioner contends that the facts and reasonable inferences demonstrated that the Union Respondents were grossly deficient in their duties and they demonstrated a reckless disregard for his rights under the Union Contract. *Ash v. United Parcel Service, Inc.*, 800 F.2d 409, 411 (4th Cir. 1986); *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980). Petitioner submits that the facts and reasonable inferences demonstrated that the actions of the Union Respondents were outside any wide range of reasonableness so as to be irrational. *Air Line Pilots Assn. Int'l v. O'Neill*, 499 U.S. 65, 67, 111 S. Ct. 1127, 1130 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)).

The decision of the Court of Appeals in affirming the decision of the United States District Court cannot be squared with its previous decisions and with that of another United States Court of Appeals.

CONCLUSION

Petitioner submits that the United States Court of Appeals overlooked evidence which supported his claim against the Union Respondents for breach of their duty of fair representation. This case involves questions of exceptional importance concerning "hybrid 301" actions within the Fourth Circuit.

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND FILED JANUARY 22, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1617

JAMES E. THOMPSON,

Plaintiff-Appellant,

v.

ALUMINUM COMPANY OF AMERICA; UNITED STEELWORKERS OF AMERICA, AFL-CIO CLC; UNITED STEELWORKERS LOCAL 303,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of North Carolina, at Durham.
William L. Osteen, District Judge.
(CA-99-943-1)

Argued: December 5, 2001

Decided: January 22, 2002

Before MOTZ, KING, and GREGORY, Circuit Judges.

Affirmed by published opinion. Judge Gregory wrote the opinion, in which Judge Motz and Judge King joined.

* * *

Appendix A

OPINION

GREGORY, Circuit Judge:

James E. Thompson appeals the district court's order granting summary judgment in favor of his employer, Alcoa Inc., and in favor of the Union appellees, United Steelworkers of America, AFL-CIO-CLC and United Steelworkers, Local 303. The district court dismissed Thompson's complaint, which was filed against Alcoa for breach of contract pursuant to Section 301 of the Labor Management Relations Act and against the Union for breach of its duty of fair representation. Because there is no evidence to support Thompson's claim against the Union for breach of its duty of fair representation, we affirm.

I.

Appellant James Thompson was employed by Alcoa in 1980 at its Mobile, Alabama plant. In 1983, following layoffs in Mobile, he transferred to Alcoa's Badin, North Carolina plant. The United Steelworkers of America have represented Alcoa employees since 1942. The Badin plant is covered by a master agreement between Alcoa and the Union, which is administered by Local Union 303.

At the Badin plant, Thompson worked as a pot tender and a pot servicer. Both jobs exposed Thompson to smoke, fumes, dust, hydrogen fluoride gases, sulfur, coal tar, various oxides, and other chemicals. Sometime in 1986 or 1987, Thompson began having pulmonary problems at work. In June of 1995, he filed a workers' compensation claim

asserting that his asthmatic condition was the result of exposure to toxic fumes at the Badin plant. Alcoa denied his claim, taking the position that his medical problems were not work-related.

In November 1995, Thompson informed the potroom safety coordinator that he could not wear the forced-air respirator required for pot servicers. He argued that his asthmatic condition made wearing a respirator unsafe. Alcoa attempted to fit Thompson with various breathing masks, but Thompson claimed they did not help. On November 17, 1995, Thompson was disciplined for allegedly refusing to wear a mask while working. A five day suspension was approved, and as a result, Thompson filed Grievance 1844.

As a result of the grievance, Alcoa sent Thompson to see a company doctor, Dr. Landis in Charlotte, North Carolina. Dr. Landis prepared a report for Alcoa in which he corroborated Thompson's assertion that he was having difficulty breathing at work. However, Dr. Landis reported that it was unclear whether this problem was caused by Thompson's employment at Alcoa. Alcoa then determined that Thompson was unable to work under the job requirements, which required him to wear a mask at all times.

On January 29, 1996, Alcoa removed Thompson from his pot servicer position and placed him on sickness and accident (S & A) leave. Thompson was told that there were no other positions available in Badin at that time. While not working, Thompson was supposed to draw S & A pay.

Appendix A

At the time he was placed on S & A leave, Thompson made an oral request to transfer to Alcoa's plant in Point Comfort, Texas, pursuant to Section 80(1)(c)[1] of the union contract. Alcoa refused his oral request, arguing that Section 80 did not apply because there had been no determination that Thompson's medical condition was in fact work-related.

Two weeks after Alcoa's refusal of his transfer request, Thompson left North Carolina, returning to Alabama so that his parents could help support him and his two children. He failed to pursue the grievance procedure by never requesting that a union representative appeal his supervisor's denial of his transfer request.[2]

---

1. Section 80 applies to employees who cannot work because of an on-the-job injury, "because of a disability attributable in whole or in part to employment with the Company." If the injured employee can perform a lower-paying job at his plant, Alcoa must pay him a wage enhancement so as to prevent a loss in his hourly rate of pay. Section 80 also contains a transfer provision. If there is no available work for the injured employee at his home plant, the employee may transfer to another plant that has work available and is currently hiring. Any medical dispute over an employee's eligibility for Section 80 benefits may be resolved by an independent third-party doctor who will render a final decision.

2. Article XIII of the collective bargaining agreement details the grievance procedures at Badin. It provides three steps an employee can take to raise a complaint regarding application of the agreement. Step 1, which Thompson completed, requires an employee to orally present the grievance to his immediate supervisor. The supervisor is required to give an immediate oral answer. If the employee is not satisfied with the supervisor's answer, a union representative is empowered to appeal the grievance to Step 2, which involves a written

(Cont'd)

Appendix A

Thompson remained in Alabama for the next year and a half on S & A leave. On July 7, 1997, he was recalled to the Badin plant to work as a caster helper, a position at a lower job grade and lower hourly rate. Shortly after his return, on July 24, 1997, Thompson approached a Local 303 official and filed Grievance 1969, alleging a violation of Section 80 for the 1996 denial of his transfer request. Grievance 1969 stated, "Employee was put out of plant due to a medical reason. Company never offered alternative work, per contract language." Grievance 1969 reported the date of the alleged incident as July 24, 1997, the same day the grievance was initiated. Thompson sought to be moved to Point Comfort, Texas.[3]

(Cont'd)
appeal discussed by the representative and a Works Manager. If the grievance is still not resolved, it can be taken to Step 3. At Step 3, the union representative discusses the matter with the company's Manager of Industrial Relations. If a grievance is denied at Step 3, the Union has the option to seek arbitration.

Thompson was allegedly aware of these procedures—he had filed at least five grievances prior to 1996. Additionally, while Thompson was on S & A leave, he did not immediately receive his benefits, so he filed Grievance 1855 through the Local 303. Thompson prevailed, and received a lump sum for the arrearage.

3. A week after filing Grievance 1969, Thompson filed Grievance 1978, in which he protested Alcoa's failure to pay him an enhanced hourly rate, again in reliance on Section 80. This grievance listed the date of incident as July 7, 1997, the day he returned to work.

Months after settlement of Thompson's workers' compensation claim, Grievance 1978 was resolved when Alcoa began paying Thompson the wage enhancement. The settlement also resulted in Alcoa paying Thompson a lump sum representing the retroactive application of the wage enhancement to the time he filed the grievance in July 1997.

Appendix A

Alcoa denied Grievance 1969 at Step 2 of the grievance procedure. Subsequently, Thompson's workers' compensation claim was resolved on April 20, 1998.[4] Therefore, another Step 2 meeting was held to address his grievance in light of the resolution. Alcoa again denied Grievance 1969, and so a Step 3 meeting was held in January of 1999. Alcoa denied the grievance at Step 3, based on two findings. First, because Alcoa had disputed Thompson's contention that his asthma was work-related in January 1996, the company asserted that Section 80 did not apply. Second, when Grievance 1969 was filed in July of 1997, Thompson had resumed work at the plant, rendering Section 80 inapplicable.

Following Alcoa's denial of the transfer grievance at Step 3, the Union decided not to pursue arbitration. Union representative Joe Weber, who presented the case at Step 3, spoke with a Union Alcoa specialist, John Herron, about the case. Herron advised Weber not to seek arbitration because Thompson would not prevail. Herron testified that the problem with the grievance was that Thompson did not pursue it until he was already back at the plant working full time. Once Thompson was working in his new job, and especially after he received the wage enhancement, Herron believed that Alcoa had complied with the Section 80 mandate.

---

4. The settlement of Thompson's workers' compensation claim provided that Alcoa pay Thompson $9000, with no deduction for the S & A benefits he received, that it acknowledge the compensability of his occupational asthma, and that the company be released from any future workers' compensation liability. The settlement did not resolve the pending grievances-it stated that Thompson could continue to pursue them and that Alcoa could continue to contest them.

Thompson argues that Alcoa breached the collective bargaining agreement by denying the transfer requests made in January 1996 and July 1997. He also claims that the Union breached its duty of fair representation by failing to appeal Grievance 1969 to arbitration. He filed an action in state court, which was removed to the United States District Court for the Middle District of North Carolina. Following discovery, the defendants moved for summary judgment, which was granted on March 30, 2001.

II.

On appeal, decisions granting summary judgment are reviewed *de novo. JKC Holding Co. LLC v. Washington Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). In reviewing the evidence, we draw all reasonable inferences in favor of Thompson, the non-moving party. We make no credibility determinations, and we do not weigh the evidence. *Edell & Assoc., P.C. v. Law Offices of Peter G. Angelos*, 264 F.3d 424, 435 (4th Cir. 2001). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Appendix A

III.

Thompson filed this action against Alcoa for breach of contract pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and against the Union for breach of its duty of fair representation. This is a so-called "hybrid 301" action, where in order to prevail on the merits against either party, an employee must prove *both* 1) that the union breached its duty of fair representation and 2) that his employer violated the collective bargaining agreement. *See DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 164-65 (1983). Though both claims are brought in one suit, a cause of action "will only lie against an employer if the union has breached its duty of fair representation of the employee." *Amburgey v. Consolidation Coal Co.*, 923 F.2d 27, 29 (4th Cir. 1991) (citing *Vaca v. Sipes*, 386 U.S. 171, 186 (1967)).[5] Accordingly, an employee "must prevail upon his unfair representation claim before he may even litigate the merits of his § 301 claim against the employer." *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 67 (1981) (Stewart, J., concurring). Because Thompson cannot demonstrate that

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5. This rule is based on federal labor law policy, which favors adjustment by the parties of disputes arising under collective bargaining agreements. "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes." *Amburgey*, 923 F.2d at 29 (quoting LMRA § 203(d), 29 U.S.C. § 173(d)). "Federal courts do not invade this domain on the complaint of an employee unless his union is 'grossly deficient' in its representation or 'recklessly disregards' the employee's rights." *Id.* (quoting *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888, 890-91 (4th Cir. 1980)).

the Union breached its duty of fair representation when it declined to appeal Grievance 1969 to arbitration, we affirm the district court's grant of summary judgment in favor of Alcoa and the Union.

A.

Thompson's claims against the Union and Alcoa are "interlocked: neither claim is viable if the other fails." *See Crider v. Spectrulite Consortium, Inc.*, 130 F.3d 1238, 1241 (7th Cir. 1997). However, we first address the claim against the Union, because federal courts review allegations against employers for breach of collective bargaining agreements *only* when an employee has first proved that the union representing him breached its duty of fair representation. *Vaca*, 386 U.S. at 186.

It is well established that unions, as exclusive bargaining agents in the negotiation, administration and enforcement of collective bargaining agreements, have an implicit duty "to serve the interests of all members without hostility or discrimination toward any, to exercise [their] discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177 (citing *Humphrey v. Moore*, 375 U.S. 335, 342 (1964)), *see also* 29 U.S.C. § 159(a). Whether a union acted arbitrarily, discriminatorily or in bad faith requires a separate analysis, because each of these requirements represents a distinct and separate obligation. *Griffin v. Int'l Union*, 469 F.2d 181, 183 (4th Cir. 1972). From our review, we find that Thompson has demonstrated

no facts from which we can infer that the Union's actions, in deciding not to appeal Grievance 1969 to arbitration, were arbitrary, discriminatory, or in bad faith.[6]

To begin, the evidence does not establish that the Union's decision not to appeal Grievance 1969 to arbitration was arbitrary. To be "arbitrary," a union's conduct towards its member must be so far outside a wide range of reasonableness that it is wholly irrational. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991). The facts here show that Union representatives, in deciding not to pursue arbitration, considered the collective bargaining agreement, reviewed the record, and based their decision on Thompson's status as a working employee. When Thompson returned to Badin and filed Grievance 1969 in July 1997, he was no longer removed from employment-he had been recalled and was working again in the Badin plant.[7] Transfers to other Alcoa plants are available under Section 80(1) only when an employee has been removed from his job, and only

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6. In his appellate brief, Thompson asserts that the Union defaulted in its duties to him in the handling of four grievances. We note that in his complaint, Thompson only claims that the Union breached its duty of fair representation by refusing to appeal Grievance 1969 to arbitration. Thus, we confine our review to that issue.

7. We note that it is sometimes helpful to look at the *arguable* merits of a union's proffered interpretation of a collective bargaining agreement in order to determine whether a union breached its duty of fair representation in failing to arbitrate a grievance. *Ooley v. Schwitzer Div., Household Mfg., Inc.*, 961 F.2d 1293, 1298 (7th Cir. 1992). Though we decline to do so here, where a court is well able to decide that the employee's contractual claim lacks merit as a matter of law, it is appropriate for the court to decide the case on that issue. *Id.*

"[i]n the event no available job exists in the plant."[8] Since Thompson was working at the plant, a job obviously existed there. Thompson even acknowledged that under Section 80, "If you're working at Badin or at another Alcoa location, you're not eligible to turn in a transfer request." J.A. at 530. Therefore, the Union's failure to seek arbitration in this matter hardly rises to the level of irrational. The Union officials here did not ignore a meritorious grievance, they made a decision not to press a grievance they believed had no chance of success. An employee has no absolute right to insist that his grievance be taken to a certain level; a "union may screen grievances and press only those that it concludes will justify the expense and time involved in terms of benefitting the membership at large." *Griffin*, 469 F.2d at 183.

We add that even if we were to assume that Grievance 1969 had merit and the Union should have appealed it to arbitration, "a union's exercise of its judgment need not appear as wise in the glaring light of hindsight, and a violation of the duty of fair representation is not made out by proof that the union made a mistake in judgment." *Smith v. Local 7898, United Steelworkers of America*, 834 F.2d 93, 96 (4th Cir. 1987). As long as a union does not arbitrarily ignore a meritorious grievance or handle it in a perfunctory manner, that union has not violated its duty of fair representation. *Griffin*, 469 F.2d at 183. The Union did not ignore Thompson's grievance — it initiated the grievance at Thompson's request, participated in two Step 2 hearings, appealed the grievance to Step 3 and participated in the Step 3

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8. The right to transfer does not constitute a vested bonus or benefit, but exists as a last resort to allow eligible employees to continue earning a paycheck.

hearing with Thompson. Union officials decided not to appeal the grievance to arbitration only because they believed Thompson would not prevail.

While the analysis of whether a union's actions were arbitrary looks to the objective adequacy of that union's conduct, the analysis of discrimination and bad faith must focus on the subjective motivation of the union officials. *Crider*, 130 F.3d at 1243. Having reviewed the record and the briefs, and having had the benefit of oral argument, we find no evidence that Union officials discriminated against Thompson in any way or acted with bad faith when they decided not to appeal Grievance 1969 to arbitration.

B.

Our conclusion that the Union did not breach its duty of fair representation resolves the case for Alcoa as well. Although not essential to the resolution of this appeal, we agree with the district court's conclusion that Thompson cannot show Alcoa breached the collective bargaining agreement when it refused to transfer him to its Point Comfort, Texas plant. In 1996, at the time Alcoa first denied Thompson's transfer request, it was operating under the assumption that Thompson's health problems were not work-related. Under Section 80 of the collective bargaining agreement, transfers are required *only* when the injury is caused by work. Hindsight always being twenty-twenty, we know now that Thompson's condition was in fact work-related. However, at the time, there had been no such

determination.[9] Furthermore, as discussed above, when Thompson filed Grievance 1969 in July 1997, he had resumed work and was no longer eligible under the contract for a transfer.

IV.

The facts, even in the light most favorable to Thompson, show that when Thompson filed Grievance 1969 in July 1997 he had already resumed working and was no longer eligible for a transfer. There are no facts from which we can infer that the Union, in declining to appeal the grievance to arbitration, acted arbitrarily, discriminatorily, or in bad faith. Thompson therefore cannot show that the Union breached its duty of fair representation. Thus, his hybrid 301 suit against the Union and Alcoa must fail. Accordingly, the order of the district court is affirmed.

AFFIRMED.

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9. Section 80(1)(d) of the Agreement states that if a dispute arises over an employee's disability or medical condition, the company's medical representatives shall make the initial determination on whether condition is work-related. If that determination is disputed by the Union, the matter shall be referred to a mutually-designated physician or medical center for a final binding determination.

The company's doctor, Dr. Landis, had stated in a letter to the company that he could not determine that Thompson's pulmonary problems were the result of Thompson's employment at Alcoa. Thompson then left Badin shortly after his transfer request was denied without pursuing the grievance procedures that were available to him under the contract.

Appendix A

JUDGMENT

FILED: January 22, 2002

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

No. 01-1617
CA-99-943-1

JAMES E. THOMPSON,

Plaintiff - Appellant,

v.

ALUMINUM COMPANY OF AMERICA;
UNITED STEELWORKERS OF AMERICA,
AFL-CIO CLC; UNITED STEELWORKERS LOCAL 303,

Defendants - Appellees.

Appeal from the United States District Court for the
Middle District of North Carolina at Durham

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

/s/ Patricia S. Connor
CLERK

APPENDIX B — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA FILED MARCH 30, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

1:99CV00943

JAMES E. THOMPSON,

Plaintiff,

v.

ALUMINUM COMPANY OF AMERICA,
UNITED STEELWORKERS OF AMERICA, AFL-CIO and
UNITED STEELWORKERS, LOCAL 303,

Defendants.

MEMORANDUM OPINION

OSTEEN, District Judge

This matter is before the court on motions for summary judgment filed by Defendants Alcoa Inc.[1] (Alcoa), United Steelworkers of America, AFL-CIO and United Steelworkers,

1. Alcoa Inc. was formerly known as Aluminum Company of America.

Local 303.[2] Plaintiff James E. Thompson (Thompson) filed an action in state court pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging that Alcoa breached the union agreement (the Agreement), and the union Defendants breached their duty of fair representation. Defendants removed this action from Superior County, Stanly County, North Carolina. Plaintiff is seeking punitive damages for Defendants' allegedly intentional, willful, and malicious acts.

Defendants also filed several motions in limine, and Alcoa filed a motion to strike portions of Thompson's affidavit. For the reasons herein, the court will grant Defendants' motions for summary judgment. Therefore, the court will not consider Defendants' other motions.

I. FACTUAL BACKGROUND

The facts, stated in the light most favorable to Plaintiff, are as follows. Plaintiff was employed by Alcoa in 1980 at its Mobile, Alabama, plant. He transferred to Alcoa's Badin, North Carolina, plant in 1983, following layoffs in Mobile. In Badin, Thompson worked as a pot tender and then a pot servicer. Both jobs were tough and dirty, exposing Plaintiff to smoke, fumes, dust, hydrogen fluoride gases, extremely hot temperatures, coal tar, sulfur, various oxides, and other chemicals.

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2. Defendants United Steelworkers of America and United Steelworkers, Local 303 are collectively referred to as "the union" in this memorandum opinion.

Appendix B

Sometime in 1986 or 1987, Thompson began working in the potrooms, which contained large pots of boiling liquid aluminum that was separated by an electric current. Around this time, Plaintiff began to experience periodic tightness in his chest and difficulty breathing. Plaintiff's pulmonary troubles worsened over the next eight or nine years, and he sought medical treatment in 1995. Plaintiff alleges that he was advised that he had asthma that was occupational in origin and that he should avoid the potrooms. In late 1995, Thompson filed a worker's compensation claim asserting that his asthmatic condition was work-related. Alcoa denied his claim because it determined that his medical problems were not work-related.

In November 1995, Thompson informed the potroom safety coordinator that he could not wear the forced-air respirator required for pot servicers. Plaintiff argued that his asthmatic condition made wearing a respirator unsafe, whereas Alcoa viewed Thompson's unwillingness as a refusal to abide by the rules. On January 29, 1996, after determining that Thompson was unable to work under the job requirements, Alcoa removed him from his pot servicer position and placed him on sickness and accident (S&A) leave. Thompson was told there were no other positions available in Badin at that time, so he drew S&A pay.

At the time he was placed on S&A leave, Thompson made an oral request that he be transferred to Alcoa's Point Comfort, Texas, facilities pursuant to Section 80(1)(a) of the union contract.[3] Alcoa refused Plaintiff's oral request,

3. At all times material to this action, Thompson was a member of the union, so the terms and conditions of his employment were embodied in the Agreement.

arguing that Section 80 did not apply because there had been no determination that Plaintiff's medical condition was work-related. Alcoa had already denied Thompson's claim for worker's compensation benefits for the same asthmatic condition. (Defs.' Br. Supp. Mot. Dis. at 4.)

Following Alcoa's refusal of his transfer request, Thompson did not follow through with the grievance procedure outlined in the Agreement. He never appealed his supervisor's answer to Step 2, but Plaintiff's failure to do so was not due to a lack of knowledge. Thompson was aware of the grievance procedure and his right to appeal the company's determination that his asthma was not work-related. He filed at least five grievances prior to 1996. (Defs.' Br. Supp. Mot. Dis., Ex. Q.) In addition, Plaintiff filed Grievance 1844 relating to S&A pay on May 16, 1996, while on S&A leave following denial of his transfer request.

Article XIII of the Agreement provides three steps an employee can take to raise a complaint regarding application of the Agreement, among other things. Step 1, which Plaintiff completed, requires an employee to orally present such grievance to his immediate supervisor. The supervisor is then required to give an immediate oral answer. If the employee is not satisfied with the supervisor's answer, a union representative is empowered to appeal the grievance to Step 2, which involves a written appeal discussed by the representative and a works manager. If the grievance still is not resolved, it is brought to Step 3, which involves discussion by the representative and the manager of industrial relations. Plaintiff failed to pursue the grievance procedure provided in the Agreement because he never requested that a union representative appeal his request to Step 2.

Appendix B

After being placed on S&A leave, Plaintiff moved back to Alabama until July 7, 1997, when he was recalled to the Badin plant to work as a caster helper, a position at a lower job grade and lower hourly rate. A couple of weeks after his return, Thompson, on July 24, 1997, filed Grievance No. BA 1969 (Grievance 1969), alleging a violation of Section 80 for denying his transfer request. Grievance 1969 stated that "[e]mployee was put out of Plant due to medical reason. Company never offered alternative work, per contract language." (Compl. ¶ 14.) Grievance 1969 reported the date of the alleged incident as July 24, 1997, the same date Grievance 1969 was initiated. (Defs.' Br. Supp. Mot. Dis., Ex. H.) Plaintiff sought to be moved to Point Comfort and to have his seniority and vacation hours restored.

Alcoa denied Grievance 1969 at Step 2 of the grievance procedure, taking the position in its April 1, 1998, written decision that "Mr. Thompson's case is a medical case. Alcoa Badin Works has contested Mr. Thompson's workmen's compensation claim. Therefore Section 80 does not come into play." (Defs.' Br. Supp. Mot. Dis., Ex. I at 2.) Subsequently, Plaintiff's worker's compensation claim was resolved on April 20, 1998, therefore, another Step 2 meeting was held to address Plaintiff's grievance in light of the resolution. Alcoa again denied Grievance 1969, stating in its December 16, 1998, answer that "[t]he Company does not believe that the issue at hand is subject to the language cited by the Union." (Defs.' Br. Supp. Mot. Dis., Ex. L at 2.) Neither Step 2 answer mentioned Plaintiff's failure to file the grievance within the time limits proscribed in the union agreement.

Appendix B

Plaintiff's Grievance 1969 was then taken by the union to Step 3. Alcoa again denied it, based on two findings. First, because Alcoa disputed Plaintiff's contention that his asthma was work-related in January 1996, Section 80 did not apply. Second, when Grievance 1969 was filed, Thompson was employed, rendering Section 80 was inapplicable. Therefore, an industrial relations consultant for Alcoa stated in a March 15, 1999, letter that "[i]t is the Company's position that Section 80 was not violated and further this grievance was filed long after the appropriate time limits had passed." (Defs.' Br. Supp. Mot. Dis., Ex. M.) Following Alcoa's denial at Step 3, the union decided not to pursue arbitration after reviewing the record and the language of the Agreement and consulting with John Herron (Herron), the International Union's representative on the tripartite arbitration panel that hears grievances under the Agreement. (Weber Dep. at 107, 116.) Under the Agreement, the union representative is empowered to "resolve, withdraw or appeal the grievance to arbitration." (Defs.' Br. Supp. Mot. Dis., Ex. A at 60.) However, the union was not required to arbitrate Grievance 1969.

Thompson argues that Alcoa breached the union agreement by denying the transfer requests made in January 1996 and July 1997. In addition, he claims that the union breached its duty of fair representation by failing to appeal Grievance 1969 to arbitration.

II. DISCUSSION

A summary judgment motion should be granted only if there is no genuine dispute as to an issue of material fact and the moving party is entitled to judgment as a matter of law.

See Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). The district court must evaluate the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences from the facts in that party's favor. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994 (1962). In this case, the parties agree on the facts, but they disagree as to whether they constituted a breach of the agreement and of the union's duty of fair representation.

A. Plaintiff's Breach of Contract Claim

Plaintiff essentially seeks to have the outcome of his worker's compensation settlement retroactively applied to his January 1996 oral transfer request in order to make Section 80 applicable. Because Alcoa accepted liability for Thompson's occupational asthma in the April 1998 settlement agreement, Plaintiff argues that a Section 80 transfer was proper. However, the dispositive issue is timing. If Alcoa had determined that Plaintiff's asthma was a work-related condition in January 1996, then Section 80 would have applied to his request. The problem for Plaintiff is that the determination was made two years later, long past the time Plaintiff could avail himself of the grievance procedure. Once Plaintiff was taken off S&A leave and reassigned to the ingot department, on the other hand, Section 80 was not applicable. Plaintiff cannot have later circumstances alter the facts as they existed in 1996; nor can he have former circumstances alter the facts as they existed in 1997.

Appendix B

Plaintiff alleges that Alcoa first breached the Agreement when it denied his oral transfer request in 1996.[4] However, Alcoa made the determination that Thompson's condition was not work-related, consistent with its refusal of his worker's compensation claim. Section 80(1)(a) states:

> When, because of a disability attributable in whole or in part to his employment with the Company, it is medically indicated that an employee be removed from his job, . . . [t]he removed employee shall be entitled to exercise all rights under the Agreement as though he had been affected by a reduction in forces. Such rights include, but are not limited to, the right to transfer to an available job in his own plant or to one in another plant if no job is available in his own plant.

(Defs.' Br. Supp. Mot. Dis., Ex. A at 100.) The Agreement further states that "the company's medical representatives shall make the initial determination" as to an employee's disability, medical indication, or health requirement if there is a dispute about his condition. (*Id.*) If the union disputes that determination, the matter is referred to a mutually designated physician or medical center for a final and binding determination.

When Plaintiff's request was denied, he did not pursue the grievance procedure. He never requested an examination by Alcoa's medical representatives; hence, Thompson also

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4. In the March 13, 2001, settlement conference, Plaintiff's counsel told the court that Plaintiff alleged that the 1996 and 1997 denials of his transfer request constituted two separate claims.

was not examined by a mutually designated physician. Plaintiff claims that Alcoa breached the Agreement in denying his oral transfer request. That would have been true had there been a determination that Thompson's condition was work-related, but Plaintiff never sought that determination in accordance with the Agreement. Because Alcoa did not consider Thompson's disability to be attributable to his employment and Plaintiff never appealed that determination, Plaintiff's 1996 transfer request was not subject to Section 80 of the Agreement.[5] Therefore, Alcoa did not breach the Agreement by refusing Thompson's oral transfer request in January 1996.

With regard to Alcoa's denial of Grievance 1969, the language of Section 80 clearly states that it applies to employees who are to be removed from employment due to a disability. As Plaintiff had returned to work on July 7, 1997, and was not about to be removed for a medical condition, he had no transfer rights pursuant to the Agreement on July 24, 1997, when he filed Grievance 1969. Thompson acknowledged that only a "removed" employee could be transferred under Section 80: "See, if you're working, you're not eligible. If you're working at Badin or at another Alcoa location, you're not eligible to turn in a transfer request." (Thompson Dep. at 62-63.) Therefore, Section 80 did not apply to Plaintiff for any incident allegedly occurring in July 1997.

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5. Plaintiff argues that he was placed in a "catch-22" situation because of Alcoa's position on Section 80. However, Plaintiff never pursued his grievance rights in January 1996. He could have obtained an evaluation by Alcoa's medical representatives and then, if he was not pleased with the outcome, he could have been examined by a mutually selected physician.

Appendix B

In addition to the inapplicability of Section 80, one of the additional reasons for denying Grievance 1969 cited in Alcoa's Step 3 decision was that it was filed "long after the appropriate time limits had passed." (Defs.' Br. Supp. Mot. Dis., Ex. M.) Thompson argues that Defendants did not comply with the time limitations set forth in the Agreement, thereby waiving them. Plaintiff contends in his complaint that Defendants are estopped from raising timeliness as a defense.

The pleadings and Defendants' exhibits indicate that neither side followed the time limits contained in Article XIII of the Agreement, which states that a grievance shall be initiated within five days of the time at which the grievant became aware of the facts underlying the complaint. Step 2 must be initiated within seven days of the decision made in Step 1, which answer must be given within three days of the employee's oral request. The Agreement specifically provides that "no grievance may be processed outside of the stated time limit" unless the parties mutually agree to extend it or an answer is not given within the required time period. (Defs.' Br. Supp. Mot. Dismiss, Ex. A at 61.)

Despite the Agreement's stated time frame for the grievance procedure, Grievance 1969 was processed over a longer period of time. Though neither side abided by the time limitations in the Agreement while proceeding on Grievance 1969, the Agreement requires an extension for any reasonable request. Defendants and Plaintiff had several meetings with regard to Grievance 1969, and the entire process spanned about a year and a half. (Persons Dep. at 79.) Robert Persons (Persons), Alcoa's human resource manager at the Badin plant, acknowledged that there have been situations in which the time limits on grievances have been waived. (Persons

Dep. at 99.) Persons also testified that "I did mention time limits [in the grievance meetings regarding Grievance 1969], but I obviously didn't make enough of a point of it to include it in my written answer." (*Id.*) Instead, Persons testified, he based his denial of Grievance 1969 on the fact that Thompson "did not come under the language of Section 80" because "from the time it was first filed till the end of 1998, Mr. Thompson had a job at Badin." (*Id.* at 75-76.) Regardless of the parties' failure to abide by the time limitations, Grievance 1969 was properly denied because Section 80's provisions were available only to employees removed for a work-related disability.

Grievance 1969 identifies the date of the grieved incident as July 24, 1997. Thus, Plaintiff cannot claim that Grievance 1969 picked up Thompson's January 1996 transfer request at Step 2 of the grievance procedure.[6] Further, Plaintiff does not make this argument in the pleadings. Even if Thompson had so argued, Grievance 1969 would be barred because it was untimely with respect to the January 1996 request. Though the parties did not abide by the Agreement's time limitations in processing Grievance 1969, neither side stopped participating; it was a continual process until Step 3 was denied. On the other hand, Plaintiff never even took his 1996 grievance to Step 2. The issue is not that Thompson did not abide by the time limitations in pursuing his 1996 transfer request — he simply did not pursue it. Even if the court viewed Grievance 1969 as a continuance of Thompson's January 1996 request, Plaintiff cannot revive his complaint over a year later, especially when he is no longer on disability leave.

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6. This interpretation is consistent with Plaintiff's counsel's contention that Plaintiff asserted two separate claims for the 1996 and 1997 requests.

Appendix B

B. Plaintiff's Breach of Duty of Fair Representation Claim

Where a collective bargaining agreement provides a grievance procedure, an employee's remedy for a breach of the agreement lies within the remedies outlined in the agreement. *See DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 163-64, 103 S. Ct. 2281, 2290 (1983). In addition, the Fourth Circuit has held that the individual employee has no absolute right to insist that his grievance be taken to a certain level: "A union may screen grievances and press only those that it concludes will justify the expense and time involved in terms of benefitting the membership at large." *Griffin v. International Union, United Automobile, Aerospace and Agric. Implement Workers of America*, 469 F.2d 181, 183 (4th Cir. 1972).

An employee may only seek judicial remedies against the union for an alleged breach of the duty of fair representation where the union has acted in a discriminatory, dishonest, or arbitrary manner in representing the employee. *See, e.g., DelCostello*, 462 U.S. at 164, 103 S. Ct. at 2290; *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S. Ct. 903, 916 (1967). The Fourth Circuit has held that the duty of fair representation is not breached where the union makes an honest mistake or exercises poor judgment. *See Smith v. Local 7898, United Steelworkers of America*, 834 F.2d 93, 96 (4th Cir. 1987). Moreover, an employee's disagreement with the union's decision "does not render that judgment arbitrary or irrational." *Power v. Kaiser Found. Health Plan*, 87 F. Supp. 2d 545, 554 (E.D. Va. 2000).

Thompson alleges no facts that support a claim of discriminatory treatment by the union. He cites examples of other employees who were allowed to transfer under Section 80, but they were all "laid off or disqualified *under* Section 80." (Pl.'s Resp. Mot. Summ. J. at 6) (emphasis added). Alcoa never determined that Plaintiff had a work-related disability. Further, Plaintiff has not demonstrated that he falls within a membership minority. *See Nellis v. Air Line Pilots Ass'n*, 815 F. Supp. 1522, 1533 (E.D. Va. 1993) (holding that a plaintiff must demonstrate that the union acted in a manner that was detrimental to the "interests of a membership minority solely to advantage the membership minority").

Plaintiff also has not produced any evidence that the union acted arbitrarily. A union's actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide-range of reasonableness,' . . . as to be irrational." *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 67, 111 S. Ct. 1127, 1130 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S. Ct. 681, 686 (1953)). The court has found that Section 80 did not apply to Grievance 1969 because Plaintiff was employed at the Badin plant at the time of the alleged incident. In addition, the undisputed facts show that the union representatives reviewed the record, considered the Agreement, and based their decision on Plaintiff's status as a working employee. Therefore, the union's decision not to pursue the matter to arbitration was not arbitrary.

Similarly, Plaintiff is unable to show that the union acted in bad faith. To sustain his claim against the union, Plaintiff must produce evidence that the union's conduct was "grossly

deficient." *Ash v. United Parcel Serv., Inc.*, 800 F.2d 409, 411 (4th Cir. 1986) (holding that "[s]imple negligence, ineffectiveness, or poor judgment is insufficient to establish a breach of the union's duty"). The union pursued Thompson's claim through the grievance procedure up to arbitration and spent time reviewing the record and consulting Herron, who had authority to hear arbitrations, before deciding not to arbitrate. Because the court finds that the union was correct in its interpretation of the Agreement, its judgment clearly was not grossly deficient, nor even poor. Hence, the union did not act in bad faith.

III. CONCLUSION

Plaintiff has failed to show that the union breached its duty of fair representation, as well as failing to prove that Alcoa breached the Agreement. Thus, the court will grant Defendants' motions for summary judgment. Alcoa's motion to strike parts of Thompson's affidavit and Defendants' motions in limine are therefore moot and will not be considered.

A judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 30th day of March 2001.

s/ [illegible]
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

1:99CV00943

JAMES E. THOMPSON,

Plaintiff,

v.

ALUMINUM COMPANY OF AMERICA,
UNITED STEELWORKERS OF AMERICA, AFL-CIO and
UNITED STEELWORKERS, LOCAL 303,

Defendants.

JUDGMENT

OSTEEN, District Judge

For the reasons set forth in the memorandum opinion entered contemporaneously herewith,

IT IS ORDERED that Defendant Alcoa Inc.'s Motion for Summary Judgment [22] is granted.

IT IS FURTHER ORDERED that Defendant United Steelworkers of America, AFL-CIO and United Steelworkers, Local 303's Motion for Summary Judgment [24] is granted.

Appendix B

IT IS FURTHER ORDERED that the remaining motions filed by Defendants are moot.

This the 30th day of March 2001.

s/ [illegible]
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING THE PETITION FOR REHEARING AND REHEARING EN BANC FILED FEBRUARY 20, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1617
CA-99-943-1

JAMES E. THOMPSON,

Plaintiff - Appellant,

v.

ALUMINUM COMPANY OF AMERICA;
UNITED STEELWORKERS OF AMERICA,
AFL-CIO CLC; UNITED STEELWORKERS LOCAL 303,

Defendants - Appellees.

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

Appendix C

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court
/s/ Patricia S. Connor
CLERK

No. 01-1717

Supreme Court U.S.
FILED
JUN 19 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES E. THOMPSON,

Petitioner,

v.

ALCOA INC., UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and UNITED STEELWORKERS LOCAL 303,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ALCOA INC.

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit properly affirmed the district court's decision to grant summary judgment in favor of Respondent Alcoa Inc. ("Alcoa") on Petitioner James E. Thompson's ("Thompson") hybrid claims under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, where Thompson failed to establish either: (a) that Alcoa violated the collective bargaining agreement; or (b) that the Union breached its duty of fair representation?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The names of the parties to this proceeding appear on the cover.

Respondent, Alcoa Inc., formerly known as Aluminum Company of America, has no parent corporation and no publicly held company owns 10% or more of its stock.

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COUNTER STATEMENT OF THE CASE

Petitioner James E. Thompson ("Thompson") brought this case against his current employer, Respondent Alcoa Inc. ("Alcoa") and his union, the International Union, United Steelworkers of America, AFL-CIO-CLC ("International Union") and United Steelworkers Local 303 ("Local 303") (hereinafter the International Union and Local 303 will be collectively referred to as the "Union") under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"). Such an action is commonly referred to as a "hybrid Section 301 case" and required Thompson to prove both that Alcoa breached the collective bargaining agreement governing working conditions at the Badin, North Carolina plant where Thompson works and that the Union breached its duty of fair representation.

The material facts pertinent to the disposition of this case were not in dispute before the district court or the appellate court. Instead, Thompson believed that the collective bargaining agreement (the "Agreement")[1] governing the terms and conditions of his employment was improperly and/or unfairly applied by Alcoa and that the Union's failure to appeal one of Thompson's grievances to arbitration was a

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1. On behalf of the plant's employees, including Thompson, the Union entered into a collective bargaining agreement with Alcoa (the "Agreement") which governs working conditions at the plant as well as established a grievance and arbitration procedure to address disputes arising out of the Agreement. At all materials times hereto, Thompson was a member of the Union and the terms and conditions of his employment at the Badin plant were embodied in the Agreement. *See* p. 120 of the Joint Appendix prepared for the United States Court of Appeals for the Fourth Circuit (hereinafter referred to as "Jt. App.")

breach of the duty of fair representation. Both the district court and the Fourth Circuit disagreed with his interpretation of the Agreement and its application to Thompson's situation. Thompson's petition describes in detail his version of the chain of events leading up to the filing of his Complaint. However, most of these facts are not necessary to a determination of the worthiness of this case for certiorari review.[2] Alcoa submits that the following facts establish both that the opinions of the Fourth Circuit and District Court in this matter are correct and that this case is not appropriate for certiorari review.

Thompson is employed at Alcoa's Badin, North Carolina plant (hereinafter referred to as the "plant" or "Badin plant"). In January 1996, Thompson was placed on sickness and accident leave ("S&A leave") when it was determined that he would be unable to perform his job's requirements. Jt. App. 231, 1179. At this time, Thompson made an oral request to be transferred to Alcoa's Point Comfort, Texas facility pursuant to the transfer provisions outlined in the Agreement.[3] Jt. App. 302-03, 647-48. Alcoa denied

2. For brevity, Alcoa incorporates by reference the Statement of Facts set forth in the decisions of the Court of Appeals for the Fourth Circuit and the district court in this matter.

3. The provision in the Agreement central to this case is found in Section 80.1 (hereinafter "Section 80") which provides in pertinent part as follows:

> 1. When, because of a disability attributable in whole or in part to his employment with the Company, it is medically indicated that an employee be removed from his job, the following shall apply:

(Cont'd)

Thompson's request because the Agreement's transfer provisions are only applicable to employees with work-related medical conditions and Alcoa did not believe Thompson's medical condition was work-related. Jt. App. 306, 1129. At this time, Thompson did not initiate the grievance procedure outlined in the Agreement to contest Alcoa's denial of his transfer request.

Approximately 18 months later, Thompson was recalled from S&A leave to the Badin plant when a position became open which was consistent with his medical restrictions. Jt. App. 569-70, 649. Less than three weeks later, on July 24, 1997, Thompson filed Grievance No. BA-1969 ("Grievance 1969") seeking a transfer to Alcoa's Point Comfort, Texas plant — the same request Alcoa denied 18 months earlier. Jt. App. 571-73. Grievance 1969 recites that the date of the alleged violation of the Agreement is July 24, 1997, the same date the grievance was initiated. Jt. App. 453. Alcoa denied Grievance 1969 on the same basis that Alcoa denied Thompson's oral request 18 months earlier, that Thompson did not suffer a work-related medical condition. Jt. App. 455-56. Also, given that Thompson was back to work at the Badin plant, Alcoa denied Grievance 1969 on the additional ground that Section 80 is not

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(Cont'd)

> a. The removed employee shall be entitled to exercise all rights under the Agreement as though he had been affected by a reduction in force. Such rights include, but are not limited to, the right to transfer to an available job in his own plant or to one in another plant if no job is available in his own plant.

Jt. App. 165.

applicable to an employee, like Thompson, who is fully employed and actually working inside the plant, regardless of whether his medical condition was work-related. Jt. App. 316-17, 458. The right to transfer was also subject to the limitation that no job be available in the employee's own plant. Jt. App. 165. Thompson himself concedes that the Agreement's transfer provisions do not apply to individuals, like himself, who are already working at the plant.[4]

On April 20, 1998, Alcoa and Thompson settled a worker's compensation claim arising out of the same medical condition that was at issue when Thompson was originally placed on S&A leave. Agreement of Final Settlement and Release ("Settlement Agreement"), Jt. App. 1042. While the Settlement Agreement recites that Alcoa accepted liability for Thompson's occupational asthma as of January 29, 1996, the Settlement Agreement specifically identifies Grievance 1969 and affords Alcoa with "its right to contest that grievance." Jt. App. 612, 1043 and 1046. Following settlement of Thompson's workers' compensation claim, the parties continued to follow the grievance procedures outlined in the Agreement regarding Grievance 1969 and Alcoa continued to deny Thompson's claims under the Agreement. Jt. App. 316-318, 457-58, 1040.[5] Following the Step Three

4. During his deposition, Thompson made the following admissions with respect to transfer rights: "[O]nce you take a job at one location, unless you get laid off, you can't transfer anywhere." Jt. App. 492. "[I]f you're working, you're not eligible [to transfer pursuant to the Agreement]." Jt. App. 530. "If you're working at Badin or at another Alcoa location, you're not eligible to turn in a transfer request." Jt. App. 530-31.

5. Alcoa believed that because Thompson was working at the Badin plant at the time he filed Grievance 1969, Section 80 did not (Cont'd)

Hearing (the final stage in the grievance procedure before arbitration), the Union considered whether to appeal Grievance 1969 to arbitration. In making the decision, the Union reviewed the record, the language of the Agreement and consulted with John Herron, who serves as the International Union's representative on the tripartite arbitration panel that hears grievances under the Agreement. Jt. App. 994 and 1003. Based upon this review, the Union believed that it would lose at arbitration and decided not to appeal Grievance 1969 to arbitration. Jt. App. 994.

REASONS FOR DENYING THE WRIT

I. The Petition Does Not Present Any Issue Appropriate For Review Under Supreme Court Rule 10 And The Writ Should Therefore Be Denied.

Supreme Court Rule 10 makes clear that review by writ of certiorari is not a matter of right but of sound judicial discretion. A petition for a writ of certiorari should be granted only in cases where there are special and important reasons for Supreme Court review. This Court has held that "'special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S. Ct. 614, 616 (1955). Further, this Court has stated that certiorari should

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(Cont'd)

afford him transfer rights. Jt. App. 316-17. Alcoa also found that Section 80 was inapplicable to Grievance 1969 because at the time Thompson initiated the grievance procedure in July 1997, there was work available at the Badin plant. Jt. App. 316-17, 1040. Finally, Thompson was told at the time of his S&A leave that Section 80 would not apply; accordingly, the time for Thompson to invoke the grievance procedure was in January 1996. Jt. App. 320-21, 340, 1040.

not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Id.* at 79, 75 S. Ct. at 620 (citations omitted). This case fails to present special or important reasons for Supreme Court review. To the contrary, in bringing this petition for certiorari, Thompson raises nothing new to suggest that the decisions of the Fourth Circuit or the district court were in error. Instead, Thompson makes two arguments which have nothing to do with the basis for the lower courts' decisions. First, his argument that the Fourth Circuit's decision is inconsistent with prior precedent is not borne out by the facts. Second, his claim that this case presents a split in the Circuits on an important issue is not correct. Finally, this case does not present any compelling circumstances which indicate that the Fourth Circuit Court of Appeals or the district court departed from the accepted and usual course of judicial proceedings so as to warrant review by this Court. For all of these reasons, as well as those set forth below, Thompson's petition should be denied.

A. The Petition Does Not Present A Conflict Between The Decision In This Case And Earlier Decisions Of The United States Court Of Appeals For The Fourth Circuit.

Thompson's petition alleges that the Fourth Circuit's decision in this case is inconsistent with its prior precedent in *Tobacco Workers Int. Union, Local 317 v. P. Lorillard Corp.*, 314 F. Supp. 513 (M.D.N.C. 1970), *affirmed in part, reversed in part on other grounds*, 448 F.2d 949 (4th Cir. 1971). Even a cursory review of the *Tobacco Workers* opinion demonstrates that Thompson's assertion is without merit.

Thompson cites to the Fourth Circuit opinion in *Lorillard* for the proposition that "a collective bargaining agreement calls into being the common law of the particular industry or of the particular plant." Petition at 2-3. However, the "holding" cited by Thompson and attributed to the United States Court of Appeals for the Fourth Circuit in the *Lorillard* case was only referenced by the district court in that matter. The issues before the Fourth Circuit in *Lorillard* had nothing to do with the "holding" as stated in Thompson's petition. Instead, the *Lorillard* decision involved questions of arbitrability of grievances and whether a court should determine the applicability of a laches defense or leave such determination to the arbitrator. These issues have nothing to do with the hybrid Section 301 claims in the case at bar. As a result, the decision in this case is not in conflict with that of the Fourth Circuit in *Lorillard* as argued by Petitioner.

Moreover, even assuming *arguendo* that: (1) *Lorillard* stands for the proposition asserted by Thompson; and (2) Alcoa's interpretation of the Agreement is incorrect based upon the "common law" of the Badin plant, certiorari review is still inappropriate in this case. The Fourth Circuit and district court properly held that Thompson's case failed on both prongs of the hybrid section 301 analysis, which required Thompson to establish both that Alcoa breached the Agreement and that the Union violated the duty of fair representation. Thompson's case necessarily fails as a matter of law because he cannot show that the Union breached its duty of fair representation in pursuing his grievance. Thus, whether or not Alcoa improperly applied the Agreement — which Alcoa specifically denies — Thompson cannot sustain his case. As a result, this argument is an insufficient basis to support this Court's certiorari review.

B. The Petition Does Not Present A Conflict In The Circuits On An Important Issue.

Thompson's petition next alleges that there is a split in the circuits on an important issue and that such "conflict" should be resolved by this Court. The alleged "conflict" concerns the application of Fed. R. Civ. P. 15(b) to amend pleadings to conform to evidence presented at trial. Thompson claims that the Fourth Circuit's decision in the instant case is in conflict with that of the Ninth Circuit in the case of *Galindo v. Stoody Co.*, 793 F.2d 1502 (9th Cir. 1986) and that therefore, there is a split in the circuits on an important issue. As with Thompson's first basis for certiorari review, this argument is not substantiated by the facts of this case or the law.

In *Galindo*, the Ninth Circuit affirmed the district court's amendment of the pleadings to conform to evidence presented at trial and noted the applicability of Federal Rule of Civil Procedure 15(b). *Id.* at 1512-1513. The Fourth Circuit has favorably cited to the decision in *Galindo* for the proposition that a district court may amend the pleadings under Federal Rule of Civil Procedure 15(b) to conform to evidence presented at trial. *See e.g.*, *Elmore v. Corcoran*, 913 F.2d 170, 172-73 (4th Cir. 1990) and *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 367 (4th Cir. 2001). It is therefore apparent that the Fourth Circuit recognizes the applicability of Fed. R. Civ. P. 15(b) in appropriate circumstances and that there is no actual conflict. Nevertheless, Thompson's petition asserts that the Fourth Circuit is at odds with the holding in *Galindo* based upon the decision in the case at bar.

The crux of Thompson's argument appears to be that the district court should have, *sua sponte*, amended Thompson's Complaint to add a grievance (Grievance BA-1844, hereinafter referred to as the "unpleaded grievance") which Thompson did not include in his original Complaint. However, Thompson did not complain about the district court's failure to amend the pleadings under Fed. R. Civ. P. 15(b) until his reply brief to the Fourth Circuit. Because he did not raise this issue in his opening brief, it has been waived. *See Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n.2 (4th Cir. 1996) (an issue first raised in a reply brief is not properly before a court of appeals); *Hunt v. Nuth*, 57 F.3d 1327, 1338 (4th Cir. 1995) (issues not raised in the opening brief but raised for first time in reply are waived).

However, even assuming *arguendo* that the district court erred in not amending Thompson's complaint to include the unpleaded grievance, Thompson's claim still fails as a matter of law and this Court's certiorari review should not issue. Thompson did not allege or produce evidence that Alcoa breached the Agreement with respect to the unpleaded grievance. Thus, even if the union breached its duty of fair representation with respect to its handling of the unpleaded grievance — which it did not — Thompson's hybrid section 301 claim will still fail as a matter of law because there is no evidence to suggest that Alcoa's conduct was in violation of the Agreement. Certiorari review is not appropriate on these facts where the ultimate result would be no different.

II. Certiorari Review Is Not Appropriate In This Case Where The Petition Simply Seeks This Court's Application Of Uncontested Law To Undisputed Facts.

In bringing his petition for certiorari review, Thompson does not include any new "facts" or "evidence" to suggest that the decisions of the lower courts were incorrect. Instead, Thompson would like this Court to apply uncontested law to undisputed facts and reach a different result.[6] This is not a basis for Supreme Court review and this Court should deny Thompson's petition for certiorari.

This case involves the well-established law concerning hybrid cases under Section 301 of the Labor Management Relations Act. This Court's long-standing precedent under Section 301, which has been interpreted consistently by the Fourth Circuit, governs the resolution of this case. In order to prevail on a hybrid Section 301 case an employee must prove **both**: (i) that the union breached its duty of fair representation of the employee; **and** (ii) that the employer violated the collective bargaining agreement. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164-65, 103 S. Ct. 2281, 2290-91 (1983). As noted by this court, because claims in a hybrid action are "inextricably interdependent," if one part of the claim fails, the other must also fail as a matter of law. *United Parcel Service, Inc.*

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6. This strategy is most evident in the final section of Thompson's petition (Petition at p.12) in which he argues that the "facts and reasonable inferences" from the evidence presented in this case demonstrate that the Union breached its duty of fair representation. Indeed, Thompson cites to the same precedent set forth by the Fourth Circuit in its published opinion for the appropriate standard of review of a Union's actions in a duty of fair representation case under Section 301 of the LMRA.

v. Mitchell, 451 U.S. 56, 67, 101 S. Ct. 1559, 1566 (1981) (Stewart, J., concurring). Accordingly, an employee "must prevail upon his unfair representation claim before he even may litigate the merits of his § 301 claim against the employer." *Id.* Here, Thompson's case failed under both prongs of the analysis. Given the well settled law in this area, this case does not present any novel issues which would warrant review by this Court.

A. The Court Of Appeals Properly Affirmed The District Court's Dismissal Of Thompson's Case Where He Failed To Establish That The Union Breached Its Duty Of Fair Representation.

The Fourth Circuit properly found that the Union had not breached its duty of fair representation in its handling of Thompson's grievances. As this Court has explained, in order to establish that a union breached its duty of fair representation, an employee must establish that the union's conduct was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S. Ct. 903, 916 (1967). *See also Griffin v. Int'l Union*, 469 F.2d 181, 183 (4th Cir. 1972). Moreover, in the specific context of the union's decision to appeal a grievance to arbitration, both this Court and the Court of Appeals for the Fourth Circuit have held that the Union's decision is to be afforded considerable deference. *See Vaca*, 386 U.S. at 191-92, 195, 87 S. Ct. at 917, 919 (reflecting that the utility of grievance machinery would be undermined if an individual employee had the absolute right to compel arbitration of all grievances and holding that a breach of the duty of fair representation is not established merely by proving that underlying grievance was meritorious); *Smith v. Local 7898, United Steelworkers of America*, 834 F.2d 93, 96 (4th Cir. 1987) (duty of fair

representation not breached when union makes honest mistake or exercises poor judgment); *Ash v. United Parcel Service, Inc.*, 800 F.2d 409, 411 (4th Cir. 1986) ("[s]imple negligence, ineffectiveness or poor judgment insufficient to establish a breach of the union's duty"). After carefully analyzing the evidence presented in this case, the Fourth Circuit properly concluded that Thompson demonstrated "no facts from which we can infer that the Union, in declining to appeal the grievance to arbitration, acted arbitrarily, discriminatorily or in bad faith." Fourth Circuit Opinion, Appendix A at p. 13a. Thompson has presented no evidence to suggest that this result was in error.

B. The Court Of Appeals Properly Affirmed The District Court's Dismissal Of Thompson's Case Where He Failed To Establish That Alcoa Breached The Agreement.

The Fourth Circuit also held that Thompson failed to show that Alcoa breached the Agreement when it refused to transfer him to the Point Comfort, Texas plant. The court concurred with Alcoa's interpretation of the unambiguous transfer provisions in the Agreement as set forth in Section 80. Thompson raises nothing new to suggest that the well-reasoned decisions of the district court and the Fourth Circuit were in error on this point.[7] Accordingly, the decision of the Court of Appeals should stand.

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7. Instead, Thompson attempts to cloud the issue on this point by alleging that other employees were treated differently under Section 80. *See* Petition at 5-6. These same arguments were raised in both the district court and the appellate court and were rejected. As set forth in more detail in Alcoa's briefs to the lower courts, the individuals identified by Thompson were not similarly situated and

(Cont'd)

CONCLUSION

Because the Court of Appeals properly affirmed the District Court's decision granting summary judgment in favor of Respondent Alcoa and Thompson presents no issues worthy of this Court's certiorari review, Respondent Alcoa respectfully requests that the Petition for Certiorari review be denied in all respects.

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consequently, Alcoa's decisions concerning these employees have no bearing on this case. Indeed, Thompson cites no evidence to support his contention that the identified employees were similarly situated. To the contrary, the evidence establishes that a reduction in force caused the lay-off status of the identified people. Jt. App. 514-515. In contrast, Thompson admitted that his disqualification was unrelated to any reduction in force. Jt. App. 534. This distinction is critical because employees who are laid off during a reduction in force are not subject to the transfer provisions in Section 80. Jt. App. 133. In any event, the specificity of the "facts" which Thompson deems important indicates that this case is of concern only to the parties involved — not others — an additional and final reason for denying the petition for certiorari review.